

Thomas M. Zuckerman
P.O. Box 1804
Woodbridge, CA 95258-1804

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September 1, 2010

Joe Grindstaff, Interim Director
Delta Stewardship Council
650 Capitol Mall, 5th Floor
Sacramento, CA 95814

RE: Delta Stewardship Council Administrative Procedures
Governing Appeals

Dear Joe:

As you know, I attended portions of the Delta Stewardship Council meetings on August 26 and 27. Agenda Item #8 concerned adoption of administrative procedures governing appeals. The document entitled "Final Draft 8/12/2010" proposes in paragraph 23 that the Council's decision on its review of the Bay-Delta Conservation Plan upon appeal shall be "de novo, based upon its independent judgment on reviewing the applicable law and facts." Based upon my long experience in these matters, I think this is a correct approach given the Council's breadth of experience and authority in this area. The Bay-Delta Conservation Plan will have wide ranging and deep implications for all uses of the Delta water supply including prior vested water rights and public trust values in addition to the operations of the export projects.

The legislature has clearly established in Water Code Section 1126 that when a court reviews a decision of the State Water Resources Control Board affecting vested water rights that it exercise its independent judgment on the evidence presented in the hearing. The standard for review by the Delta Stewardship Council should similarly be based upon its independent judgment on the evidence presented to or by the Department of Fish and Game and its decision related to the

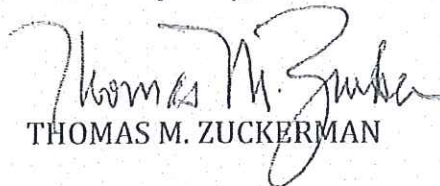
Bay-Delta Conservation Plan, in addition to the other factors which the legislation has directed the Council to consider.

There was, perhaps, some confusion in the use of the words "de novo" in the discussion by the individual council members. Typically, a "de novo" hearing does not entail re-trying the entire case, but does entail a close examination of the underlying record to determine whether the decision under appeal was supported by the "weight of the evidence" as opposed to "substantial evidence."

The consequences flowing from the Bay-Delta Conservation Plan are of such significance that "de novo" review as to law and facts is clearly called for in my judgment.

The letter submitted by the Metropolitan Water District of Southern California dated August 26, 2010 on this subject and which was made available at the meeting, relies heavily upon "legislative history" of the Delta Reform legislation enacted during last year's Seventh Extraordinary Session. Anyone familiar with that process would caution against relying upon such "legislative history" since hardly anyone (other than apparently the Metropolitan Water District of Southern California) had any idea what was going on in the final drafting and adoption of that legislative package. Certainly Delta interests did not and it would add insult to injury to suggest that an issue as important as this was "part of the deal."

Yours very truly,



THOMAS M. ZUCKERMAN

TMZ:csf

cc: Craig Stevens,
Deputy Attorney General

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Executive Office

Via Email and Hand Delivery

August 26, 2010

Delta Stewardship Council
West Sacramento City Hall Galleria
1110 West Capitol Avenue
West Sacramento, CA 95691

**RE: *Comments on Delta Stewardship Council Administrative
Procedures for Appeals and Reviews***

Dear Chairman Isenberg and Council Members:

As you know, The Metropolitan Water District of Southern California (Metropolitan) worked closely with the Schwarzenegger Administration and the Legislature to develop the Delta reform legislation enacted during last year's Seventh Extraordinary Session. Metropolitan was an early supporter of the process and each element of the legislative package that ultimately was enacted, including SBX7-1, the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act).

The Delta Reform Act -- the legislation creating the Delta Stewardship Council -- went through many iterations during the drafting process reflecting the careful thought that went into the extent of the Council's authority and its relationship to existing regulatory and planning processes. In particular, the Council's duties in relation to development of the Bay-Delta Conservation Plan (BDCP) were the subject of much discussion and careful draftsmanship. We believe the language proposed in Appendix 3 to the Council's draft Final Draft Interim Plan conflicts with very specific restrictions on the Council's relationship to existing regulatory processes and is contrary to general law regarding review of administrative agency decisions.

Proposed Appendix 3 establishes the Council's procedures for appeal and review of elements of the Delta Plan. Of particular importance to Metropolitan is the assertion in Appendix 3 that the Council has the authority to appeal to itself the Department of Fish and Game's (DFG) determinations regarding the BDCP and then to disregard DFG's determinations and substitute its own judgment. Metropolitan wholeheartedly joins in the State and Federal Contractors Water Agency's July 28, 2010, detailed comment letter analyzing the errors in this interpretation of the Council's appellate authority, and will not repeat them here.

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We would, however, point out the following specific statutory language and expressions of intent regarding DFG's NCCP Act authority that directly contradict the position taken in Appendix 3:

- First, of course, is the Fish and Game Code Section 2820 specific authorization that "the department [of Fish and Game] shall approve a natural community conservation plan" if it makes certain findings.
- The Delta Reform Act's Section 85320 recognizes DFG's authority by clearly directing that the Council "*shall incorporate* the BDCP into the Delta Plan" if the "*Department of Fish and Game* approves the BDCP as a natural community conservation plan," meets the requirements of the section and has been approved as a habitat conservation plan.
- Section 85322 reiterates the point that it is DFG's, not the Council's, authority to make these determinations by stating that the chapter of the Delta Reform Act dealing with the BDCP "does not amend, or create any additional legal obligation or cause of action under the [NCCP Act]." Even more sweepingly, Section 85031(a) provides that the Reform Act "does not affect any of the following: (a) the Natural Community Conservation Planning Act . . ."
- The Senate floor analysis for SB 7X-1 -- the analysis that was current when the Legislature voted on the bill -- similarly recognizes the strong legislative intent that "These [savings] sections also maintain SWRCB jurisdiction and preserve regulatory authority generally, in order to clarify that the new Delta Stewardship Council is NOT a super-regulatory agency that trumps other regulatory agencies, such as SWRCB and DFG."

The Council's authority to consider DFG's determinations on appeal must be read in this statutory context and legislative intent. Rather than dispensing with DFG's determinations and substituting its own findings "based on its own independent judgment" as proposed in Appendix 3, the Council must abide by settled law regarding review of administrative agency decisions. That law requires deference to the agency and upholding the agency's determination unless there is an abuse of discretion or the decision is not supported by substantial evidence in the record. (See e.g. *Environmental Protection Information Center v. Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 516).

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In addition to the legal necessity to revise the Appendix to correctly describe the Council's appellate role, the proposed Appendix is not consistent with the legislative intent, exemplified in Sections 85301(a) and 85322 and the bill analysis quoted above, that the legislation was not intended to create a "super regulatory agency that trumps" existing agencies, amend their existing statutory authority or create additional barriers to success in meeting the co-equal goals. The legislation conveys the understanding that it would be consistent with existing law, including the specific language in the Delta Reform Act preserving deference to DFG's discretion under the NCCP Act. This understanding will be undone unless the assertion of a Council "independent judgment" authority to make NCCP Act determinations is corrected.

Metropolitan strongly urges the Council to revise Appendix 3 to correctly describe the standard of review on appeal that is required under existing law and the Delta Reform Act itself. This correction will restore the framework established by the Legislature for inclusion of the BDCP in the Delta Plan. We remain committed to working within that framework with the Council and all interested parties in the development and implementation of the Delta Plan, the BDCP and all other actions necessary to meet the goals of the Delta Reform Act.

Very truly yours,



Jeffrey Kightlinger
General Manager

cc: Joe Grindstaff, Acting Executive Director
Keith Coolidge, Acting Chief Deputy Executive Officer
Elaine Martin, Assistant to Acting Executive Director Grindstaff